

Castaways Management, Inc. and Hotel, Motel, Restaurant & Hi-Rise Employees & Bartenders Union, Local 355, AFL-CIO and Hotel, Resort Service Union, Local 3 of Greater Miami & South Florida Area. Cases 12-CA-8831, 12-CA-8985, 12-CA-9184, and 12-CA-9179

June 12, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On September 22, 1987, the National Labor Relations Board issued its Decision, Order, and Direction of Second Election in this proceeding,¹ in which the Board, *inter alia*, ordered the Respondent, Castaways Management, Inc., to offer reinstatement to nine named discriminatees, and to make them whole for any loss of earnings and benefits suffered as a result of the Respondent's unfair labor practices. Subsequently, the United States Court of Appeals for the Eleventh Circuit entered a judgment enforcing the Board's Order.² A controversy having arisen over the amount of backpay and benefits due under the Board's Order, as enforced by the court, the Regional Director for Region 12 issued and duly served on the Respondent a compliance specification and notice of hearing alleging the amounts of backpay due the discriminatees and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. The Respondent, through its attorney, filed an answer. Thereafter, the Regional Director issued an amended specification to which the Respondent filed an answer. On January 15, 1991, the Regional Director issued a second amended compliance specification.

On January 25, 1991, the Respondent filed an answer to the second amended compliance specification. The answer is signed by the Respondent's attorney, but includes neither a power of attorney nor the Respondent's mailing address. The answer denies every allegation of the specification, including those paragraphs of the specification which relate to the computation of gross backpay, without offering an alternative formula, alternative wage rates, or alternative gross backpay totals. The answer also alleges, with regard to all nine discriminatees, that the "General Counsel did not take into account tips on subsequent jobs," and that "no employee seeking work could find none and wages and tips were rising." With regard to discriminatee Maximino Gil, the answer further states that Gil was employed by another employer following his discharge from the Respondent and subsequently discharged from that position for stealing.

On March 13, 1991, the General Counsel filed with the Board a motion to strike Respondent's answer and a Motion for Summary Judgment, with exhibits attached. The General Counsel alleges that the Respondent's answer fails to conform to the requirements of Section 102.56 of the Board's Rules and Regulations in that the answer, *inter alia*, is not affixed with the appropriate power of attorney, nor is the post office address of the Respondent provided; fails to specifically admit, deny, or explain each and every allegation of the specification; and fails to properly dispute the accuracy of the backpay figures or the premises on which they are based. The General Counsel also contends that the answer raises no litigable issues requiring a hearing on the issue of willful loss of employment or failure to exercise reasonable diligence in seeking interim employment with respect to some or all of the discriminatees. Accordingly, the General Counsel requests that the answer be stricken in its entirety and that the Motion for Summary Judgment be granted as to all matters contained in the compliance specification. Alternatively, the General Counsel moves that the Respondent's answer be stricken and Motion for Summary Judgment be granted with respect to all allegations in the specification, except for the issues of interim earnings of all the discriminatees and of the willful loss of employment of Maximino Gill.

On March 15, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On March 28, 1991, the Respondent filed an opposition to the General Counsel's motion, contending that the answer is signed "Attorney for Respondent," is specific, and is in compliance with the Board's Rules and Regulations. The Respondent also states that the General Counsel knows the Respondent's mailing address and has included it on all documents to date.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board makes the following

Ruling on Motion for Summary Judgment

Section 102.56(a), (b), and (c) of the Board's Rules and Regulations states, in pertinent part:

(a) *Filing and service of answer; form*. . . The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the mailing address of the respondent.

(b) *Contents of the answer to the specification*.—The answer shall specifically admit, deny, or explain each and every allegation of the speci-

¹ 285 NLRB 954.

² 870 F.2d 1539 (11th Cir. 1989).

fication, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or plead specifically and in detail to backpay allegations of specification.*— . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The General Counsel contends that the Respondent's answer should be stricken in its entirety because it fails to include a power of attorney and the Respondent's post office address as required by Section 102.56(a). Although the Board has emphasized that a pleading that substantially fails to conform to the Board's procedural rules will normally be stricken in its entirety,³ we decline to strike the answer in the instant proceeding. As the Respondent states in its opposition, the answer was signed "Attorney for Respondent," and the Respondent's attorney has represented the Respondent in all aspects of this case for the past 11 years. Further, the General Counsel, through its correspondence, has indicated its knowledge of the Respondent's mailing address, and no documents have ever been returned to the General Counsel because of an incorrect address. Thus, while the answer may contain certain procedural defects, we do not find it so substantially deficient as to require it being struck in its entirety. Under these circumstances, we deny the General Counsel's motion to strike the answer in its entirety.

Notwithstanding our acceptance of the answer, we agree with the General Counsel that the answer to the

backpay specification is deficient insofar as it contains general denials as to those compliance matters within the Respondent's knowledge. The answer does not specifically dispute the accuracy of the gross pay figures contained in the specification or provide any specific alternative formula for computing the amounts of backpay due, as required by Section 102.56(b). While the Respondent states that the figures are incorrect because a tip credit was not taken into account, this statement is erroneous as a matter of law.⁴ As the Respondent has failed to deny specifically the gross backpay allegations or to explain adequately its failure to do so, we strike the Respondent's answers to the extent that they address those allegations of the compliance specification and deem those allegations of the second amended compliance specification to be admitted as true. *Lobster Trap & Casa Sirena Marina Hotel*, 287 NLRB 1322 (1988); *William Minter Masonry Contractor*, 260 NLRB 1121 (1982). Accordingly, we shall grant the Motion for Summary Judgment as to these allegations.

The Respondent has, however, put in issue the amount of the discriminatees' interim earnings by stating in the answer that tips were not considered, that any employee seeking work should have reasonably been able to find some, and that Gil was discharged by a subsequent employer for stealing. It is well settled that general denials of allegations involving interim earnings are sufficient to warrant a hearing on those issues. *Ricks Construction Co.*, 272 NLRB 424 (1984); *Sheet Metal Workers Local 13 (Sheet Metal Contractors)*, 266 NLRB 59 (1983). Accordingly, we shall order a hearing limited to the determination of the discriminatees' interim earnings.

ORDER

It is ordered that the General Counsel's motion to strike the Respondent's answer is granted to the extent that it addresses allegations of the compliance specification pertaining to the computation of gross backpay.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is granted except with regard to allegations concerning the discriminatees' interim earnings.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 12 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge, for the purpose of taking evidence concerning the discriminatees' interim earnings. The judge shall prepare and serve on the parties a decision containing

³ *Scotch & Sirloin Restaurant*, 287 NLRB 1318, 1320 fn. 5 (1988).

⁴ Under the Fair Labor Standards Act, an employer may pay a tipped employee less than the minimum wage. However, this rule applies only if the employer can show that the employee receives at least the minimum wage when tips are taken into account. Moreover, under the National Labor Relations Act, the Respondent must make the discriminatees whole, tips and all. *Home Restaurant Drive-In*, 127 NLRB 635 fn. 2 (1960).

findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the judge's decision on the parties, the provi-

sions of Section 102.46 of the Board's Rules and Regulations shall be applicable.